United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7099,7100

To be argued by
Franklin Poul

United States Court of Appeals
FOR THE SECOND CIRCUIT.

REA EXPRESS, INC.,
Plaintiff-Appellant, Cross-Appellee,

against

INTERWAY CORPORATION and
INTEGRATED CONTAINER SERVICE, INC.,
Defendants-Appellees,

INTERWAY CORPORATION,
Defendant-Cross-Appellant.

Appeal From the United States District Court for the Southern District of New York.

REPLY BRIEF FOR APPELLANT AND BRIEF FOR CROSS-APPELLEE.

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I. REA'S RIGHT TO DEMAND REGISTRATION WITHOUT JOINDER OF THE PLEDGEE.

Interway apparently does not dispute our position that the language of the governing agreement of October 11, 1968 gave REA the right to demand registration without any requirement that REA be the "holder" of the preferred shares at the time of the demand. Their response (p. 15) is that "this is not a sensible conclusion as to what the parties intended", and a reference to a prior document as "clarification" of the meaning of the contract.

The only proffered explanation of why the provision as written was not "sensible" is the point that Interway would be put to useless effort and expense for a registration if REA proved unable to take advantage of the registration by converting its preferred shares to common and selling them to the public. Granted that there would be some economic waste in such a process. But the situation would be no different if REA were the "holder", demanded a registration, and then subsequently decided not to convert or not to sell, or decided to sell the preferred shares to a private purchaser who in turn chose not to take advantage of the registration. In any event, the risk of a wasted registration had no special significance to Interway. The burden of performing its contractual obligation

was the same to Interway whether REA ultimately got some advantage out of it or not.

Conversely, the interpretation offered by Interway -- that REA had to be the holder at the time of the demand for registration -- would have created an obvious practical problem for REA if, as indeed it turned out, the shares were pledged and REA needed the impact of the registration statement itself (or at least the assurance that it was going forward) to be in a position to gain the consent of the pledgee or arrange alternate financing so that an obdurate pledgee could be paid off. Interway notes (pp. 15-16) that REA made the decision "to bestow legal title to the shares on other persons" and thereby "accepted the risks consequent thereon." But the plain meaning of the agreement of October 11, 1968 was that REA had made a perfectly "sensible" contract with Interway which avoided at least some of the risks of a pledge which put the stock in another's name.

The issue before this Court, of course, is not whether in the light of the conflicting interest of the parties a requirement that REA be a holder at the time of the demand for registration would have been more or less sensible than the agreement actually entered into. The essential point is that there is nothing so remarkable about the terms of the agreement as written by the parties as to justify a rearrangement by the Court of the contractual relationship.

The fact that the September 23, 1968 submission of an offer by Interway did express registration rights in terms of the "holder" (JE 138) in no way detracts from the clarity of the ultimate agreement which, although it makes reference to the prior offer, goes on to spell out in detail the rights of REA in connection with its option, including its registration rights. (249a)

II. INTERWAY'S DEMAND FOR PRELIMINARY CONVERSION

Interway does not dispute the fact that it never receded from the position that it would take no steps toward registration until after conversion of the preference shares into common. The arbitrary nature of this position (see Appellant's original brief, pp. 15-16) is only emphasized by the defenses now submitted for it. At pp. 17-18 Interway argues it was "not unreasonable" to rewrite the contract this way because such conversion would offer "the most conclusive proof" of REA's control over the record holder. Interway then goes on to quote (p. 18) language about registering at the request "of any preference shareholder." But this quotation comes from the September 23, 1968 offer, not the October 11, 1968 contract which modifies it (251a-252a). The clear language of the latter is simply ignored.

The next line of defense (pp. 18-21) is that it does not matter whether Interway had a right to impose the

requirement of conversion in advance, because REA nevertheless agreed to supply the consent of the holder to conversion and registration and the letter "signed by its counsel as agent" gave rise to a "modification of the original contract" (p. 20).

Interway partially quotes at page 18 the letter which is relied on to support the supposed agreement to modify the original contract. The full quotation is as follows (the underlined portion being what Interway omitted):

> "In response to your letter of July 1, 1971, we do not consider REA's demand for a registration of the shares of Interway Common Stock into which their shares of Interway Preference Stock are convertible to be in any way defective. While we do not feel it is necessary, we are in the course of obtaining the consent of the person for whom Kugler is the nominee to the registration and conversion of the 79,020 1/2 shares now standing in that name." (288a-289a)

The letter concludes with the demand "that you commence forthwith in the preparation of a registration pursuant to the agreements previously made between you and REA." (291a)

Finally Interway affects not to understand (p. 21) how Interway's convert first demand interfered with REA's ability to supply the consent of the pledgee. But the uncontradicted evidence is that this was the sticking point insofar as the existing pledgee was concerned (309a, 126a-

127a),[/1] and the greater difficulty of finding a substitute lender before the stock became saleable is obvious.

Interway now offers the suggestion (pp. 21-22) that the objections of the pledgee to advance conversion could have been satisfied by a document in which the consent to conversion was contingent on the effectiveness of the registration. But at the time Interway was inflexibly insisting on an immediate conversion before any registration steps could take place. The arguments of REA's counsel against this requirement were being flatly rejected. (288a-291a, 304a-306a) Neither REA nor the pledgee had been given any reason to believe a contingent consent to a later conversion would be useful. There is no evidence that Interway would in fact have been influenced by such a document (or indeed that Interway had any real concern about the position of the pledgee). In fact REA did seek the consent of the pledgee, just as it sought the consent of the SEC to avoid the registratuon problem altogether. But in doing so REA was not able to offer the pledgee a reasonable expectation that the pledgee's formal relinquishment of a right (however qualified) would result in Interway's proceeding with a registration which would turn the pledgee's security into saleable stock. The arbitrary way in which Interway precluded such an expectation by insisting

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/1 Judge Brieant made no factual finding on this point. See Appellant's original brief, p. 12.

on consent to preliminary conversion is underscored rather than mitigated by Interway's after the fact suggestion that a more reasonable course might have been pursued.

III. INTEREST ON THE COUNTERCLAIM

We agree that the interest question is governed by C.P.L.R. §5001, and that this statute does not allow a discretionary denial of interest simply as a matter of fairness.

On the other hand, the statute (quoted in Interway's brief, p. 24) requires a determination of when the cause of action existed and when the damages were incurred, as a basis for computation. Here the computation would be extremely complex.

As Judge Brieant found, and as Interway's witness conceded, the financial statements of Realco were "true and correct" within the customary context of generally accepted accounting principles (109a). The items as to which recovery was allowed (about 1% of Interway's original demand, 302a) related, inter alia, to subsequent bankruptcies of railroads whose accounts were normally carried for as long as three years (105a), and to subsequent complex readjustments of necessarily estimated accounts receivable and equalization allowances (106a, 108a). Moreover, nothing became due under the agreement until the claims exceeded

$50,000 (110a).

Under these circumstances, the denial of interest could have been premised, at least in large part, on Interway's failure to sustain its burden of proof as to the time of accrual.

In any event, Interway has not, by its mere reference to the date of the agreement, established a basis for computing the amount of interest. We do not object to having the question of interest on the counterclaim resubmitted to the court below on remand. /2

Respectfully submitted,

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/2 It is our understanding that Interway does not seek to pursue the issue in the event that the dismissal of REA's claim is affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC.,	:	
Plaintiff-Appellant, Cross-Appellee	:	
v.	:	
INTERWAY CORPORATION and INTEGRATED CONTAINER SERVICE, INC.,	:	NOS. 76-7099, 7100
Defendants-Appellees,	:	
INTERWAY CORPORATION,	:	
Defendant-Cross-Appellant.	:	

CERTIFICATE

I hereby certify that I have caused to be delivered to Stephen A. Weiner, Esquire two copies of the Reply Brief of REA Express, Inc., Appellant and Cross-Appellee, on June 7, 1976.

Franklin Poul

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